

NTSB Order No. EA-4451

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD  
at its office in Washington, D.C.  
on the 30th day of April, 1996

Respondent .

Docket SE-14401

## 6679

(No. 497644931), with airline transport pilot privileges, on the ground that he had falsified a medical certificate application, in violation of section 67.20(a)(1) of the Federal Aviation Regulations ("FAR," 14 CFR Part 67).<sup>2</sup> For the reasons discussed below, the appeal will be granted.

The Administrator's February 7, 1996 Order of Emergency Revocation, as amended on March 8, 1996, alleged the following facts and circumstances concerning the respondent:

- 2) On or about October 12, 1995, you made application for and received a Medical Certificate Second Class, issued pursuant to Part 67 of the FARs.
- 3) On the application referred to in paragraph 2 hereof, in response to question 18(m), have you ever had any mental disorders of any sort, depression, anxiety, etc., you indicated "No" by placing a check-mark in the "No" box.
- 4) On or about September 29, 1995, approximately two (2) weeks prior to your completing the medical application referred to in paragraph 2 hereof, you were psychologically tested and evaluated by a clinical psychologist, Ph.D., and he clinically diagnosed you as quite depressed with suicidal ideation on a regular basis, and an overall attitude of helplessness and hopelessness with much inner anxiety.
- 5) On the application referred to in paragraph 2 hereof, in

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<sup>2</sup>FAR section 67.20(a)(1) provides as follows:

§ 67.20 **Applications, certificates, logbooks, reports, records: Falsification, reproduction, or alteration.**

(a) No person may make or cause to be made--

(1) Any fraudulent or intentionally false statement on any application for a medical certificate under this part....

response to question 19, visits to health professional within last 3 years, you did not indicate that on September 29, 1995, you visited Dr. Kenneth MacDonald, Ph.D., a clinical psychologist, for a psychological evaluation including psychological testing using the Minnesota Multiphasic Personality Inventory (MMPI), at the end of which you agreed to outpatient psychotherapy on a weekly basis with Dr. MacDonald.

At the hearing in this proceeding the respondent acknowledged that he had met with a psychologist at his attorney's office on September 29, but he essentially denied that he knew the exact purpose of the meeting or that he learned of any diagnosis concerning depression until sometime after he completed the medical certificate application on October 12.<sup>3</sup> Moreover, despite documentary evidence (Adm. Exh. 6) indicating that the respondent began undergoing weekly psychotherapy sessions with Dr. MacDonald following the September 29 evaluation, respondent also denied meeting with him between September 29 and October 12.

As to the failure to note on the application the September 29 meeting with Dr. MacDonald, respondent indicated that he did not consider that meeting to have been a visit with a health professional because it had taken place at the office of the attorney handling his criminal case.<sup>4</sup>

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<sup>3</sup>On October 2, 1995, counsel representing respondent in a criminal matter moved for an indefinite continuance of the scheduled trial date on the ground that "defendant has been diagnosed by a licensed psychologist as suffering from severe depression and is therefore unfit at this time to testify on his behalf and fully cooperate with his attorneys in preparing a defense in this cause" (see Adm. Exh. 3).

<sup>4</sup>The respondent, by counsel, has filed a reply opposing the Administrator's appeal. Attached to the reply is a March 8, 1996 psychiatric evaluation of respondent conducted in connection with

The law judge's determination that no intentional falsification of respondent's medical certificate application had been proved does not appear to rest on either a weighing of the probative value of the evidence the parties submitted or on a resolution of the credibility issues the case presented. In fact, his closing comments point, we think, not to any belief that the respondent testified truthfully about when he became aware of the psychologist's findings, but a conclusion that respondent should not be held accountable for any falsifications concerning the meeting with or diagnosis of Dr. MacDonald because his assessment of respondent's mental state may not be trustworthy,<sup>5</sup> given the non-aviation context in which they occurred.<sup>6</sup>

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his pending criminal proceeding. It concludes, inter alia, at p. 6, that respondent is competent to stand trial, with "current psychological testing [showing] no indications of symptomatology of a significant mental disorder."

<sup>5</sup>After recounting his judicial experience with irreconcilable claims in divorce cases, the law judge observed (I.D. at pp. 94-95):

And I suspect in this case that the thrust of Dr. MacDonald's opinion was designed to obtain a continuance for his then client, Mr. Steelman, the attorney....But it may very well be that at the same time he had written that, if he had been writing it for...Mr. Summers, to the FAA about obtaining a medical, that it would have sounded completely different but it would have been the same person....And I sort of think that is where this evidence has come from today, but I do believe -- and it will be my finding -- that there has not been shown intentional falsification.

<sup>6</sup>It is not clear from the law judge's decision whether he understood that the September 29, 1995 meeting with the psychologist at respondent's attorney's office was for the

While we recognize that Dr. MacDonald's letter in support of the continuance painted a far more seriously depressed individual than the one he later wrote to the FAA, after it learned of the earlier diagnosis, we do not think this circumstance changes anything, since Dr. MacDonald, notwithstanding his obvious subsequent intent to make respondent's condition sound less debilitating, did not abandon his opinion that the respondent was suffering from depression, even when he learned that his role in helping to secure a continuance in the criminal case had put respondent's medical certificate at risk.<sup>7</sup> In other words, the record before the law judge simply does not justify a finding that the matter of depression was concocted simply to achieve a delay in another forum.<sup>8</sup> At the same time, the law judge's apparent reversal of the revocation order on this ground leaves the issues the parties actually litigated undecided; namely,

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purpose of obtaining a continuance in a pending criminal case, rather than in a divorce proceeding.

<sup>7</sup>For example, in his October 2, 1995 letter (Adm. Exh. A-4) to the attorney handling respondent's criminal case, Dr. MacDonald described respondent as "extremely depressed, emotionally bland, and psychologically isolated," demonstrating poor judgment, and "experiencing suicidal ideation on a regular basis...." In his October 18, 1995 letter to the FAA Regional Flight Surgeon (Adm. Exh. A-6), he softened that assessment somewhat, indicating, among other things, that respondent did "exhibit characteristics of an Adjustment Disorder with Depressed Mood" but that there "was no data to suggest any suicidal ideation or impaired judgment."

<sup>8</sup>Moreover, there is no evidence that the respondent was aware of any scheme to hoodwink the criminal court into granting a continuance. Thus, the record provides no basis for any belief that such a scheme would have allowed the respondent to honestly answer on the application that he did not have any mental disorder involving depression.

whether the respondent knowingly provided false answers to two questions on the medical certificate application. Our review of the record convinces us that he did.

On its face, the evidence adduced by the Administrator at the hearing established at the very least that the respondent would have known, before the medical certificate application was filled out, that he had a problem with depression significant enough to require reporting. It seems to us more likely than not that an individual introduced, by his attorney in a criminal case, to a clinical psychologist and subjected to psychological testing by him would have been naturally interested in learning the purpose of the testing and how its findings might be used in the context of the legal work his attorney was retained to perform. Nevertheless, even if it was believable that respondent could undergo such testing without inquiring about the reasons for it or its results until weeks later, there is one piece of documentary evidence in the record which compels the conclusion that the medical application was intentionally falsified.

On January 9, 1996, the FAA Central Region's Flight Surgeon sent respondent a letter requesting the surrender of his medical certificate in view of a medical report indicating that he had been *diagnosed as suffering from clinical depression* and advising respondent that the FAA was investigating whether he had falsified the October 12 medical certificate application by his "no" answer to the question concerning "mental disorders of any sort: depression, anxiety, etc." See Adm. Exh. A-7. The

respondent did not, in response to this correspondence, deny, as he has done here, that he was aware of the diagnosis of depression when he answered the question. To the contrary, respondent's answer, which discusses, among other things, how he would distinguish depression from mere sadness, suggests, we think, that he was fully aware of Dr. MacDonald's opinion when he filled out the application, but did not agree with it: "You have underscored 'depression' in your letter to me. All of the information does not indicate that I have ever had or now have any form of depression. It was my belief that this is the reason why I did not check the box for mental disorder. I did not believe at that time and don't believe now that being sad about having cancer and getting divorced is 'suffering from a mental disorder.'" See Adm. Exh. A-8.<sup>9</sup> We think the conclusion is inescapable that if respondent had not already been aware that a genuine issue concerning depression had been raised by Dr. MacDonald, he would have had no reason, in this letter, to attempt to explain why he had decided not to answer yes to the question on mental disorders. He would have simply indicated that on October 12, 1995, he had no reason to believe otherwise.

In view of the forgoing, we find that a preponderance of the reliable, probative, and substantial evidence does, contrary to the initial decision, support a conclusion that respondent knew

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<sup>9</sup>Respondent had been treated for testicular cancer about a year earlier. He apparently learned sometime before September 29, 1995, that his wife, who he had been separated from for several months, was seeking a divorce.

that his answer to question 18(m) was false.<sup>10</sup> The issue, as the Administrator correctly recognizes, is not whether the respondent agreed with Dr. MacDonald's professional assessment of his mental condition at the time, but whether he was aware of it. Since the evidence weighs more heavily in support of a finding that he was, respondent's disagreement with that health professional, based on no more than his own untrained self-evaluation, cannot defeat a finding that respondent knowingly or intentionally falsified his medical certificate application.

**ACCORDINGLY, IT IS ORDERED THAT:**

1. The Administrator's appeal is granted;
2. The initial decision is reversed; and
3. The March 8, 1996 AMENDED Order of Emergency Revocation is affirmed.

HALL, Chairman, GOGLIA and BLACK, Members of the Board, concurred in the above opinion and order. FRANCIS, Vice Chairman, and HAMMERSCHMIDT, Member, did not concur.

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<sup>10</sup>The evidence that respondent purposefully did not report the depression for which he was being treated also supports a conclusion that the failure to report the visit(s) to Dr. MacDonald, in response to question 19, was not inadvertent.